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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

KEHINDE JEDIDIAH JACKSON,

Defendant and Appellant.

A142998

(Marin County
Super. Ct. No. SC187274A)

A jury found defendant Kehinde Jedidiah Jackson guilty of the felonies of first degree burglary and receiving stolen property (Pen. Code,¹ §§ 459, 496(a)), plus the misdemeanor offenses of disorderly conduct and aggravated trespass (§§ 647(h), 602.5, subd. (b)). The trial court sentenced defendant to state prison for an aggregate term of four years for the burglary, a concurrent term of eight months for the receiving count, and additional concurrent terms of six months for the disorderly conduct and trespass counts. Execution of sentence was suspended, and defendant was admitted to probation upon specified conditions.

The two contentions made by defendant involve issues connected to his mental state. The one contention advanced by the Attorney General involves a pure issue of law. None of the three contentions requires a detailed summary of the evidence received at trial. The following will suffice:

¹ Statutory references are to this Code.

At about 5:00 a.m. on Christmas eve 2013, Mill Valley resident James O'Donnell answered his front door bell, found no one there, but then observed defendant on the roof of the house. O'Donnell told defendant to leave. Defendant replied that he would leave, and did so. O'Donnell summoned police.

Very shortly thereafter, Sigfried Kohl, O'Donnell's next door neighbor, heard a noise in his kitchen. Investigating, he found defendant examining a "plug in bug detector." Kohl asked defendant how he got into the house. Without looking at Kohl, and while still examining the bug detector in his hands, defendant replied "a friend gave me this key." After a few moments of awkward silence, Kohl asked defendant what he was looking for, defendant responded "You can help me to find it." Mrs. Kohl came on the scene, and defendant apologized to her for the inconvenience he had created. Eventually, Kohl told defendant to leave. Defendant did so, taking the detector.

Within minutes, officers summoned again by O'Donnell apprehended defendant crouching outside the O'Donnell house. Seated in a police vehicle, defendant was identified by Kohl. Two days later, O'Donnell found a key at the spot where defendant was arrested. The key fit the Kohl house door lock.

The issue of defendant's mental state first arose on April 2, 2014, the date set for his preliminary examination. At that time, Debra Lewis, defendant's counsel, advised Judge Sweet of her doubts as to defendant's competence to stand trial. Defendant "adamantly" opposed, but Judge Sweet suspended criminal proceedings in accordance with section 1368, and appointed two psychiatrists to examine defendant.

Two days later, on April 4, Judge Simmons heard defendant's motion for appointment of new counsel pursuant to *People v. Marsden* (1970) 2 Cal.3d 118. Judge Simmons denied the motion without prejudice in order that "we . . . get the doctors' reports . . . first . . ."

On April 28, having received the reports of Drs. Martin Blinder and Jonathan French, both of whom concluded that defendant suffered from no mental infirmities that

rendered him incompetent,² Judge Simmons declared him competent and reinstated the criminal proceedings. Judge Simmons advised defendant he would be getting new counsel.

New counsel La Dell Dangerfield took over defendant's case at the preliminary examination at which defendant was ordered held to answer the charges. Eventually, the case was assigned to Judge Chou for trial. Jury selection was underway when defendant renewed his *Marsden* motion. Judge Chou conducted an in chambers hearing on the motion, and denied it.

After three days of testimony, the case went to the jury. Following deliberation of less than three hours, the jury returned its verdicts.³ Over defendant's objection, Judge Chou found good cause for a continuance in order that the probation officer could prepare a sentencing report.

Although defendant had three DUI convictions, the probation officer recommended that defendant be admitted to yet another grant of probation. It was noted

² Dr. Blinder noted that defendant had a "rigid defense system" and a "pathological unconscious defense mechanism of denial," which included an "irrational fixed belief" that he was being followed by law enforcement officers in Marin County. Although his report contains the words "paranoid" and "delusional," Dr. Blinder concluded: "I can find no symptoms that would place Mr. Jackson in an Axis I DSM category, and certainly nothing that I as a psychiatrist could treat."

Dr. French noted that during his interview defendant "exhibited no symptoms of serious psychiatric impairment," and "I observed no symptoms of psychosis or affective instability. [¶] . . . [¶] Although I did pick up subtle indications of characterological problems which conceivably could form the basis of a personality disorder." "He may have attitudes and opinions that could prove difficult for defense counsel, but these I deem to be largely characterological in nature, and likely not the product of a serious mental disorder as might be coded on Axis I."

³ The jury was unable to reach a verdict on another misdemeanor charge. The court declared a mistrial as to that count. After the jury was discharged, the court found defendant in violation of conditional sentence probation in two pending cases, and summarily revoked those grants of probation, which were reinstated at the time of sentencing.

The minutes show that the jury was put into the bailiff's care at 11:19 a.m., and returned with its verdicts at 2:59 p.m. We are assuming there was a break of at least 60 minutes for lunch.

that this was an atypical residential burglary: “This residential burglary of an occupied dwelling is considered less serious than most other instances of this type of crime given that the victims were not actively confronted by the defendant and no verbal harm was threatened. [¶] . . . [¶] No weapon was used or displayed. [¶] . . . [¶] None of the victims suffered physical injury and none of the victims appeared to have any strong emotional response to the defendant’s conduct. [¶] . . . [¶] The defendant was an active participant in the crime, but it is unclear if he was totally cognizant of his behavior at the moment” “The defendant is homeless and clearly is suffering from alcohol abuse and possibly a mood disorder, for which he is in denial, but he is educated, has some family support, and in the past has maintained regular employment. [¶] . . . [¶] [I]mprisonment would likely cause additional psychological harm to the defendant.”

On July 31, 2014, Judge Chou “had a lengthy sidebar discussion with counsel and Probation, and I’ve expressed my concerns about the recommendation that’s been made by Probation.” Judge Chou told defendant: “I am seriously considering, or I was considering sending you to state prison. That’s presumptively what your sentence should be in this case after being convicted of . . . first degree residential burglary. I am willing to consider an alternative.” As explained by defendant’s counsel, the court “wanted a commitment that he was going to cooperate with a psychological evaluation,” which would have to be completed “before you [the court] were willing to consider changing your mind” Judge Chou also told defendant: “what I want to see from you is a commitment to working with any of the health care providers who try to create a plan for you.” The court reiterated that it would only consider such a plan, “but I’m making you no promise.” Sentencing was continued to August 27.

On August 27, Judge Chou stated he had “received a report from Dr. Gretchen White”⁴ Defendant’s counsel used Dr. White’s report to argue for probation: “There’s . . . a possibility of a mental condition not amounting to a defense [see Cal. Rules of Court, rule 4.413(c)(2)(B)] Dr. White said that this was an adjustment

⁴ Although we have before us the reports of Drs. Blinder and French, Dr. White’s report is not in the record on appeal.

disorder. He was suffering from stress from his divorce. He's in the normal range, although he may have some paranoid thinking in this case, but he did cooperate, Your Honor, and that's one of the things that I think you indicated . . . you would take into consideration . . . and I think he did do that”

The prosecutor did not oppose probation, yet was uneasy: “The only concern I have, and I suspect it's the Court's concern as well, was whether or not there was an underlying mental health issue for this conduct, because it was, for lack of a better term, bizarre. And he did participate in an evaluation, for which I give him credit for. [¶] But . . . his answers for why he committed these crimes on that day is absolutely unbelievable, and it does cause me concern that either he is continuing to be in denial, or maybe . . . this was caused by some alcohol or drug abuse.” Defendant assured the court he would be “compliant with any terms and conditions that you place upon me.”

Judge Chou noted that the “victims have indicated that they don't want to see you sent to state prison, the People have indicated that they don't want to see you sent to state prison, and Probation has indicated that they don't want to see you sent to state prison.” Judge Chou sentenced defendant to state prison for the middle term of four years for the burglary. The remainder of the sentencing—which came only after defendant had been admitted to probation—was as follows:

“With respect to Count 2 . . . your conviction of a violation of Penal Code Section 496, subdivision (a), I find that the mid term is appropriate. Two years will be imposed; however of those two years, only eight [months] will be imposed, so one third of the mid term will be imposed. That will be concurrent to any sentence I impose in this case.

“Pursuant to your conviction in Count 4 . . . a violation of Penal Code Section 647(h), a six-month sentence will be imposed. That will be concurrent to any other sentence imposed in your case. And pursuant to your conviction in Count 5 to a misdemeanor violation of Penal Code Section 602.5, subdivision (b), six months will be imposed. That will be concurrent to any other sentence imposed.”

REVIEW

Defendant Fails to Demonstrate That Denial of His *Marsden* Motions Constituted Prejudicial Error

Defendant's first contention is apparently that both Judge Simmons and Judge Chou erred in denying his motions to relieve his appointed counsel. Defendant is partially correct as to the denial by Judge Simmons, but not as to the denial by Judge Chou.

“When a defendant seeks discharge of his appointed counsel on the basis of inadequate representation by making what is commonly referred to as a *Marsden* motion, the trial court must permit the defendant to explain the basis of his contention and to relate specific instances of counsel's inadequacy. [Citations.] ‘A defendant is entitled to have appointed counsel discharged upon a showing that counsel is not providing adequate representation or that counsel and defendant have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result.’ ” (*People v. Cole* (2004) 33 Cal.4th 1158, 1190.) “We review the denial of a *Marsden* motion for abuse of discretion. [Citation.] Denial is not an abuse of discretion ‘unless the defendant has shown that a failure to replace counsel would substantially impair the defendant's right to assistance of counsel.’ ” (*People v. Taylor* (2010) 48 Cal.4th 574, 599.)

Judge Simmons was incorrect in denying defendant's initial *Marsden* motion in the belief that she was powerless to act. It is now clearly established that a trial court must conduct a *Marsden* hearing even during the pendency of competency proceedings. (*People v. Taylor, supra*, 48 Cal.4th 574, 600–601 [“the trial court erred when it [denied defendant's motion] for substitution of counsel in the belief that the question of defendant's competence to stand trial first had to be resolved”].) However, the erroneous denial cannot have prejudiced defendant because, when criminal proceedings were reinstated within the same month, defendant achieved the purpose of his motion when Ms. Lewis was replaced by Mr. Dangerfield. (*Id.* at p. 601 [no prejudice from erroneous refusal to hold *Marsden* hearing because appointment of new counsel “ ‘gave defendant everything he sought’ ”].)

A fair reading of defendant's brief is that he is attacking only Judge Simmons' denial of his initial *Marsden* motion. However, much attention is given by defendant to recounting what occurred before Judge Chou. Out of an abundance of caution, we address the second denial by Judge Chou.

During voir dire, defense counsel Dangerfield was remarking about the presumption of innocence and a defendant not being obligated to produce evidence or personally testify. In the course of doing so, he asked prospective jurors: “[H]istory books are riddled with examples of unfair prosecution because a person is presumed guilty because they didn’t call witnesses [¶] Mr. Jackson does not carry a burden of any kind. None whatsoever. . . . [D]o you think you can sit and be fair and impartial knowing that there won’t be any witnesses called, or do you think that’s so big of a problem that you simply cannot sit? [¶] . . . [¶] I’m going to ask that each of you sit and consider whether the fact that there won’t be any witnesses called by the end of the process, . . . because if it does we’re going to need to know about it.” And then: “[T]he crime of residential burglary, which is charged, involves entry, it involves intent, it involves other elements. If one of those elements isn’t proven do you have any problem finding that he’s not guilty of residential burglary? [¶] You are going to hear evidence that Mr. Jackson entered someone’s home. Does that fact standing alone convince any one of you . . . that he’s guilty of residential burglary? [¶] . . . [¶] . . . POTENTIAL JUROR . . . : Would you restate the way you phrased it? [¶] MR. DANGERFIELD: Sure. You’re going to hear evidence that Mr. Jackson did in fact enter someone’s home. Does that fact alone convince you that a residential burglary occurred? ”

When a break was taken, defendant made another request to change counsel. With only the prosecutor excused, defendant launched into a denunciation of Mr. Dangerfield: “He contaminated the whole jury pool, Judge. He told them I’m pleading not guilty without me testifying. He told them that it is an uncontroverted fact that I committed the crime.” Defendant also claimed that there was a conflict of interest because he wanted to challenge a guilty plea in a prior case because “they [the public defender] had me plead guilty” but “didn’t explain the whole plea bargain process to me sufficiently.”

Defendant continued: “I still don’t have my full discovery. And he just told all of the potential jurors that I’m guilty. [H]e swayed the judgment of all of them. They’re all biased, the whole pool of jurors is biased. This case is done. And then . . . you tell them . . . that it’s uncontroverted fact, and I can’t defend myself because I’m not taking the stand” . . . [¶] “I need new counsel.” “This is not going to work.”

Judge Chou asked for comments from Mr. Dangerfield, who responded that “voir dire is exactly the place where bad facts are typically explored. [¶] . . . [¶] And as the Court is well aware . . . and what the Court will instruct the jury of, is that what counsel says is not evidence.” Counsel anticipated that three witnesses would testify that defendant entered a residence, so “there’s going to be an ID of him in the house.” “Mr. Jackson has, through this entire process, expressed to me, at least, that he was not desirous of any defense that involved mental incapacity. There has never been any discussion of identity.” Dangerfield was “taken aback . . . with Mr. Jackson’s reaction, given . . . how many times he’s had counsel confer with him about this case”

“I never told anyone that Mr. Jackson committed a crime. I asked them if the singular fact that he was present in the home was enough to convince them. . . . [¶] [I]f the gravamen of his issue is with the use of the word uncontroverted, it’s because there has been no raising of an identity issue at this point.” Dangerfield was unaware of “any pending conflicts.”

Judge Chou denied defendant’s motion as follows: “I see that there is definitely a tactical disagreement between defense counsel and the defendant. However, I don’t see that it rises to the level of inadequate representation. What I see here is that Mr. Dangerfield has decided to front the issues that he’s presented to this jury pool. And Mr. Jackson I think it makes sense to do that now so that you can decide and possibly remove individual jurors who will not be able to consider this case fairly and with an open mind. That’s why he’s flushing it out now. Now, you may take issue with this tactic, but I don’t see that it rises to the level of incompetence. I don’t see that it rises to the level of inadequate representation. What I see is that there is a disagreement. I’ve seen Mr. Dangerfield in court. He represents the interests of his clients with . . . zealously

and . . . capability. He is a very good attorney. You may take issue with this, but it does not rise to the level of me granting the *Marsden* motion. So your motion is denied.”

Defendant does not now dispute what was implicit at the time—that he and Mr. Dangerfield had already tentatively agreed that defendant would not testify. (Cf. *People v. Williams* (1970) 2 Cal.3d 894, 905 [“A disagreement between a defendant and appointed counsel regarding the [defendant testifying] in his own behalf does not necessarily require the appointment of another attorney”].) The only other percipient witnesses would be the residents, and Mr. Dangerfield clearly anticipated how they would testify. The single unexplained and unsubstantiated line about defendant not getting his “full discovery” was implicitly contradicted by Mr. Dangerfield’s reference to the number of conferences with defendant. As for the supposed conflict with the public defender’s office, it dealt with the conviction underlying one of defendant’s pending probation revocations (see fn. 3, *ante*), and defendant failed to identify how it might hobble Mr. Dangerfield’s performance.

Thus, there is clearly a strong basis for Judge Chou characterizing this as a dispute over trial tactics. To the extent defendant’s version diverged from Dangerfield’s, Judge Chou “was entitled to credit counsel’s explanations and to conclude that defendant’s complaints were unfounded.” (*People v. Taylor, supra*, 48 Cal.4th 574, 600.) Such a dispute, if it does not evidence a complete rupture of the attorney-client relationship, does not compel bringing in new counsel. (See *People v. Dickey* (2005) 35 Cal.4th 884, 921–922; *People v. Valdez* (2004) 32 Cal.4th 73, 97; *People v. Nakahara* (2003) 30 Cal.4th 705, 718–719.) There being no showing of a substantial impairment of defendant’s constitutional right to the effective assistance of counsel, we cannot conclude that Judge Chou abused his discretion in denying defendant’s second *Marsden* motion. (*People v. Taylor, supra*, at p. 599; *People v. Cole, supra*, 33 Cal.4th 1158, 1190.)

Defendant Fails to Demonstrate His Trial Counsel Was Constitutionally Incompetent

Defendant’s contention—that trial counsel Dangerfield was constitutionally incompetent because he did not introduce evidence of defendant’s “mental illness”—is to be evaluated according to well established principles:

“Defendant has the burden of proving ineffective assistance of counsel. [Citation.] To prevail on a claim of ineffective assistance of counsel, a defendant ‘ “must establish not only deficient performance, i.e., representation below an objective standard of reasonableness, but also resultant prejudice.” ’ [Citation.] A court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance. [Citation.] Tactical errors are generally not deemed reversible, and counsel’s decisionmaking must be evaluated in the context of the available facts. [Citation.] To the extent the record on appeal fails to disclose why counsel acted or failed to act in the manner challenged, we will affirm the judgment unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation. [Citation.] Moreover, prejudice must be affirmatively proved; the record must demonstrate ‘a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.’ [Citation.]” (*People v. Maury* (2003) 30 Cal.4th 342, 389.) Our Supreme Court has characterized this burden as “difficult to carry on direct appeal.” (*People v. Vines* (2011) 51 Cal.4th 830, 876.)

Here, we do have an explanation of why counsel Dangerfield acted as he did—“Mr. Jackson has . . . expressed to me . . . that he was not desirous of any defense that involved mental incapacity.” Having just asserted in connection with his *Marsden* motion that Dangerfield should have acted as his ministerial agent, defendant now faults Dangerfield for “blindly follow[ing]” that desire. We assume no such occluding of counsel’s professional judgment. Defendant takes it as a given that he did in fact have a diagnosable “mental illness.” We make no such assumption. (See § 1026 [defendant

“presumed to have been sane at the time the offense is alleged to have been committed”].) On the contrary, we assume that Dangerfield was the experienced and competent criminal defense attorney noted by Judge Chou. We further assume that during their numerous conferences Dangerfield and defendant discussed possible mental defenses issues. The reports of Drs. Blinder and French would be an obvious source of information, but their mutual conclusion was that defendant suffered from no mental disease or defect. (See fn. 2, *ante*.) Matters such as defendant’s consumption of drugs or alcohol immediately prior to December 24, 2013 would obviously depend on testimony from defendant, testimony which he and counsel had already decided would not be presented. Together with defendant’s hostility to using such a defense, reasonably competent counsel in these circumstances could make the tactical decision not to present expert testimony (assuming it could be found), but instead to hope that the evidence that even the prosecutor admitted was “bizarre” might persuade the jury that defendant had no larcenous intent prior to entry of the Kohl residence.

In order to demonstrate ineffective assistance of counsel, defendant has to establish that Dangerfield should have known further investigation would reveal such evidence as would overcome defendant’s objections and would have such potency that if presented to the jury was reasonably likely to result in more favorable verdicts. (See *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1244; *People v. Williams* (1988) 44 Cal.3d 883, 937.) As noted, on direct appeal this is a difficult burden of persuasion. (*People v. Vines, supra*, 51 Cal.4th 830, 876.) We cannot conclude that defendant has satisfied it.

Judge Chou’s Imposition of an Illegal Sentence Can Be Corrected On This Appeal

“The subordinate term for each consecutive offense shall consist of one-third of the middle term of imprisonment prescribed for each other felony conviction for which a consecutive term of imprisonment is imposed” (§ 1170.1, subd. (a).) Judge Chou followed this “one-third of the middle term” for the *concurrent* sentence imposed on defendant’s receiving stolen property conviction. “Because concurrent terms are not part of the principal and subordinate term computation under section 1170.1, subdivision (a),

they are imposed at the full base term, not according to the one-third middle term formula” (*People v. Quintero* (2006) 135 Cal.App.4th 1152, 1156, fn. 3.) Thus, the Attorney General treats defendant’s sentence as unauthorized, not covered by the normal rule requiring appropriate contemporaneous objection, and correctable at this time by this court. (*People v. Smith* (2001) 24 Cal.4th 849, 854; *People v. Thompson* (2009) 177 Cal.App.4th 1424, 1432.) Defendant does not disagree.

The order of probation is affirmed. The clerk of the Marin County Superior Court is directed to correct the sentencing minutes for August 27, 2014 to show that defendant’s concurrent sentence on count 2 is for two years.

Richman, J.

We concur:

Kline, P.J.

Miller, J.

A142998; *P. v. Jackson*